

No. 15924 /

United States
Court of Appeals
for the Ninth Circuit

JACK J. WALLEY, Executor of the Estate of
Murrey London, Deceased,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

APR - 9 1958

PAUL P. O'BRIEN, CLERK

No. 15924

United States
Court of Appeals
for the Ninth Circuit

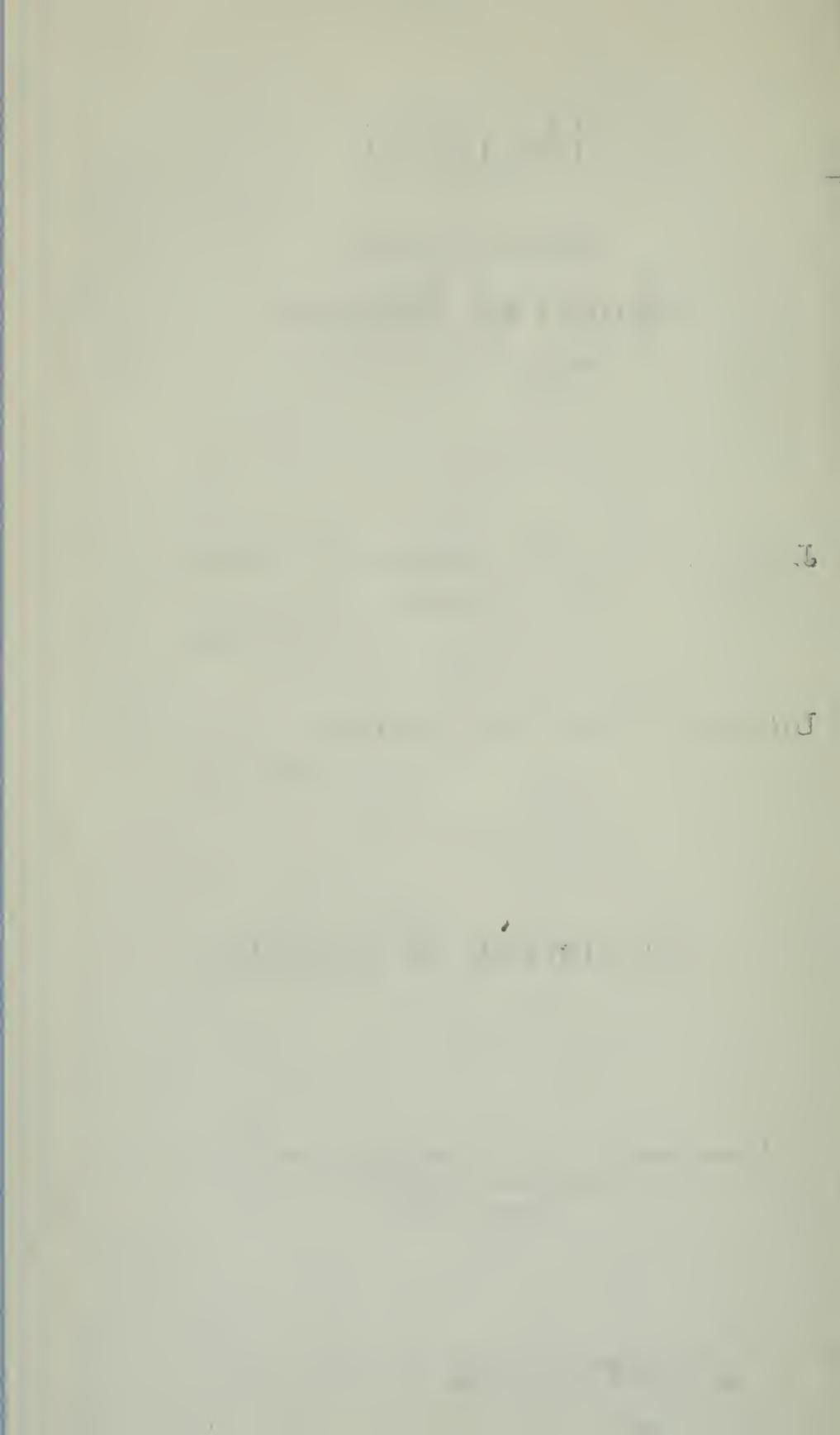
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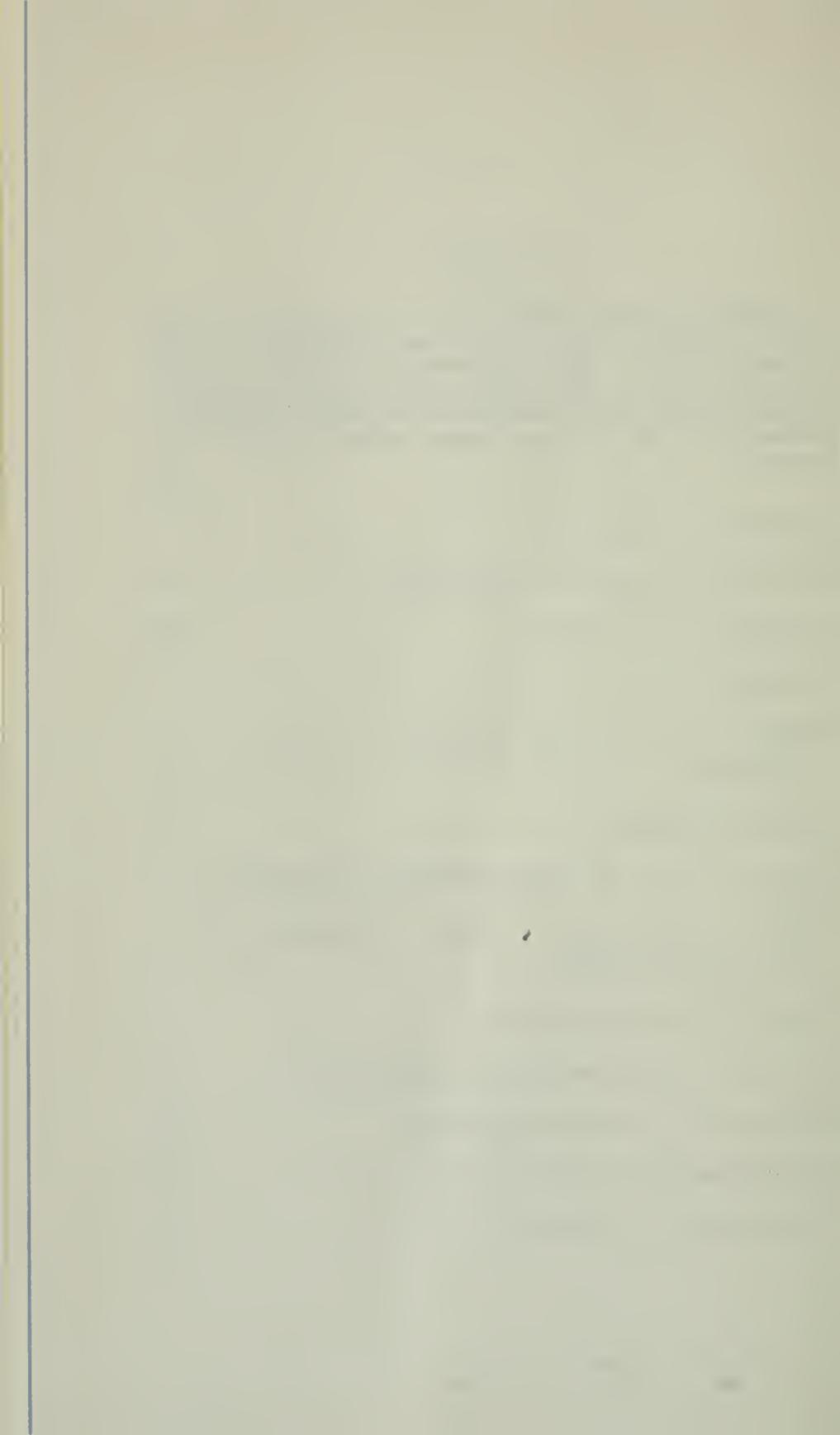
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer to Complaint	7
Attorneys, Names and Addresses of	1
Certificate by the Clerk	26
Complaint	3
Findings of Fact, Conclusions of Law and Judgment	18
Notice of Appeal	25
Notice to Clerk to Prepare Clerk's Transcript	25
Order for Findings of Fact, Conclusions of Law and Judgment	17
Pretrial Conference Order	8
Pretrial Conference Order, Supplemental	12
Statement of Points, Appellant's	29
Stipulation Re Applicable Law	14
Substitution of Attorneys	24



NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

MILTON DAVIS,
408 So. Spring Street,
Los Angeles 13, California.

For Appellee:

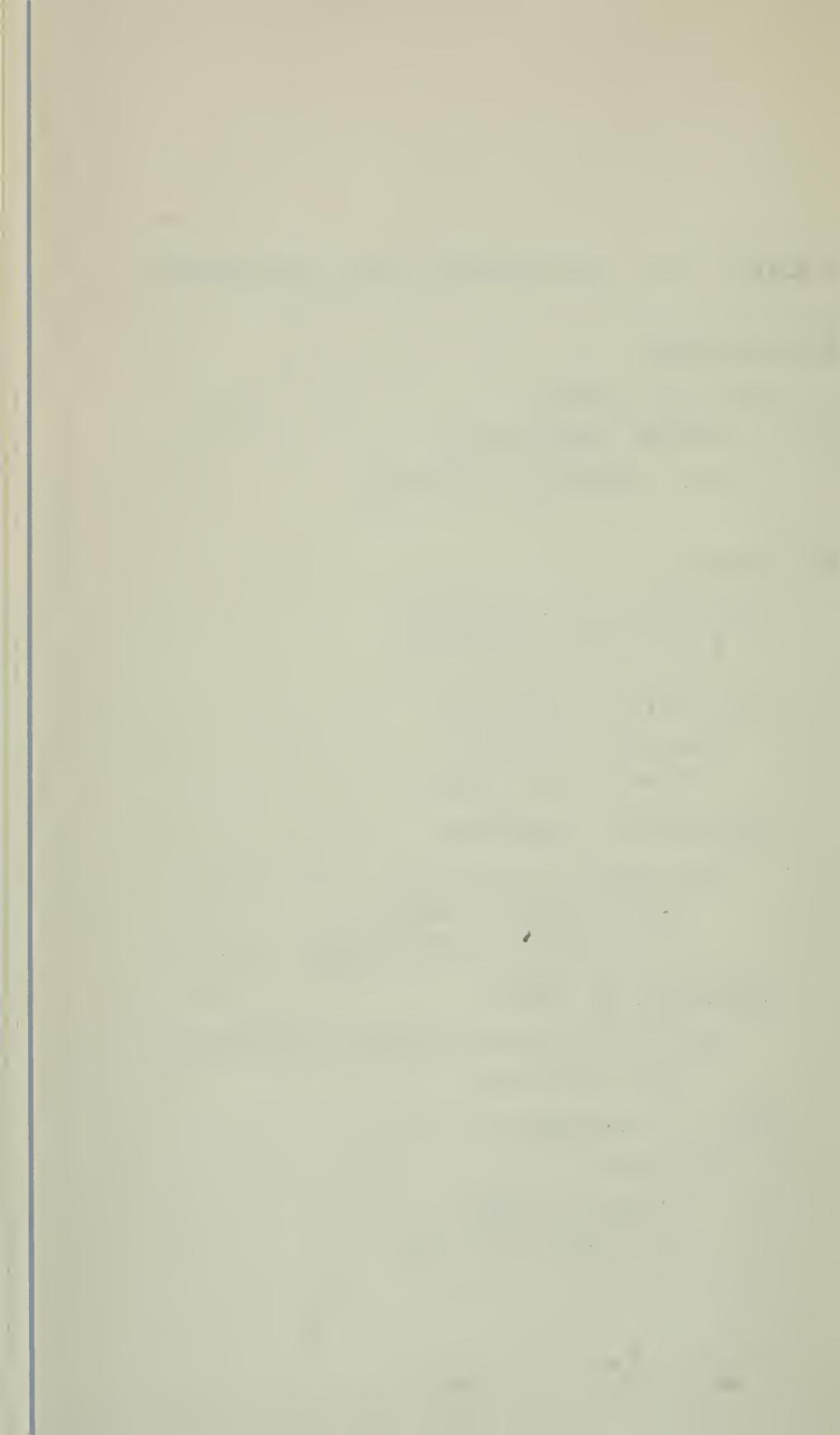
LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Asst. U.S. Attorney,
Chief, Tax Division;

REMBERT T. BROWN,
Assistant U.S. Attorney,
808 Federal Building,
Los Angeles 12, California;

CHARLES K. RICE,
Asst. U.S. Attorney General, Tax Division,
Dept. of Justice;

LEE A. JACKSON,
Attorney,
Dept. of Justice,
Washington 25, D. C.



United States District Court for the Southern District of California, Central Division

No. 313-57—WM

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK JAY WALLEY, Executor of the Estate of Murrey London,

Defendant.

COMPLAINT FOR COLLECTION OF INTERNAL REVENUE TAXES

Plaintiff, United States of America, appearing herein by its attorneys, Laughlin E. Waters, United States Attorney; Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and Rembert T. Brown, Assistant United States Attorney, complains of defendant and alleges as follows:

I.

The plaintiff is, and at all times material hereto was, a corporation sovereign and body politic.

II.

This is an action of a civil nature arising under Sections 3670 and 3671 of the Internal Revenue Code of 1939 and Sections 7401 and 7403 of the Internal Revenue Code of 1954, and 28 U.S.C., Section 1340, authorized and requested by the Commissioner of Internal Revenue of the United States and

brought under the direction of the Attorney General of the United States. [2*]

III.

The defendant, Jack Jay Walley, is a resident of the Southern District of California and on October 25, 1954, was appointed executor of the estate of Murrey London, Deceased, which estate is now the subject of probate proceedings pending in the Superior Court of California, in and for the County of Los Angeles, No. 357,157.

IV.

Prior to his death on September 13, 1954, the decedent, Murrey London, operated a business under the name of the London Construction Company at 937 South Burlington Avenue, Los Angeles, California.

V.

The Commissioner of Internal Revenue assessed against the aforesaid Murrey London, doing business as London Construction Company, Federal Internal Revenue taxes of the type, for the taxable period, and in the amounts set forth below. The Collector of Internal Revenue for the 6th Collection District of California received the respective assessment lists showing the assessments of the aforesaid taxes on the dates shown below, on which dates liens of the United States of America arose against all property and rights to property of the taxpayer, as provided in Sections 3670 and 3671 of the 1939

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Internal Revenue Code. Shortly after the receipt by the Director of each assessment list, notice of each tax assessed was given to the taxpayer and demand was made upon him for the payment of each tax so assessed, but only the amount of \$243.29 as set forth in paragraph VI hereinbelow has been paid. There remains due, owing and unpaid to the United States of America on each lien the sum shown in the last column, which represents the balance of the assessed tax plus subsequently accruing penalties and interest computed through March 8, 1957. Further interest accumulates on the total balance of assessed taxes, penalties and interest from said [3] date at the statutory rate of six per centum per annum. In addition, lien filing fees of \$5.00 have been incurred.

Type of Tax	Taxable Period	Amount Assessed	Assessment List Rec'd.	Balance Due
	4 Qtr.			
Withholding	1947	\$2,764.93	Feb. 24, 1948	\$4,264.90
Insurance	4 Qtr.			
Contributions ..	1947	338.70	Mar. 1, 1948	538.15
Unemployment	1947	187.19	Mar. 1, 1948	289.43
Additional				
Unemployment	1947	800.02	July 13, 1948	1,207.31
Insurance	1 Qtr.			
Contributions ..	1948	279.29	July 23, 1948	421.93
Withholding	1 Qtr.			
	1948	1,304.69	July 22, 1948	1,967.35

VI.

On March 1, 1948, the decedent Murrey London filed a petition in bankruptcy No. 45752-MW in the United States District Court for the Southern District of California. On September 14, 1948, a claim for the aforementioned taxes was filed by the United

States in said bankruptcy proceeding. This claim was allowed by the Court in the amount of \$5,759.04, which in effect constituted a final adjudication of the rights of the United States and Murrey London, decedent. There was subsequently received by the United States in partial satisfaction of this allowance the sum of \$243.29, which amount was applied by the said United States to the satisfaction of the tax liability. Other than this partial payment in the amount indicated, no part of the allowance in bankruptcy has been paid, notwithstanding proper demands therefor.

Wherefore, plaintiff demands judgment against the defendant, Jack Jay Walley, as Executor of the Estate of Murrey London, Deceased, in the amount of \$8,694.07, together with penalties [4] and interest as provided by law and for its cost herein incurred.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States Attorney, Chief, Tax Division;

REMBERT T. BROWN,
Assistant United States Attorney;

/s/ REMBERT T. BROWN,
Attorneys for Plaintiff,
United States of America.

[Endorsed]: Filed March 8, 1957. [5]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now the defendant, Jack Jay Walley, as Executor of the Estate of Murrey London, and answers the complaint as follows:

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

The right of action set forth in the complaint did not accrue within six years next before the commencement of this action.

Third Defense

Defendant admits the allegations contained in paragraphs I, II, III and IV of the complaint; defendant admits all of the allegations contained in paragraph V of the complaint, except that [6] defendant denies the allegation that there remains due and owing or unpaid to the United States of America on each lien the sum shown in the last column of the tax assessment set forth in said paragraph, or any sum whatsoever; defendant admits all of the allegations contained in paragraph VI of the complaint, except that defendant denies that the claim in the amount of \$5,759.03 was allowed by the court, and further denies that the allowance of the claim of plaintiff in the bankruptcy proceedings

constituted a final adjudication of the rights of the United States and Murrey London, decedent.

Fourth Defense

That the claim of the plaintiff United States for taxes, penalties and interest as alleged in said complaint, has been rendered uncollectible by reason of the fact that this proceeding was brought beyond the time permitted by the provisions of Section 1635 and Section 3312 of the Internal Revenue Code of 1939.

Wherefore, defendant prays that plaintiff recover nothing by its complaint, and that defendant have judgment as to which defendant may be entitled.

MILTON DAVIS and
LEO M. ZINNER,

By /s/ LEO M. ZINNER,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 26, 1957. [7]

[Title of District Court and Cause.]

PRETRIAL CONFERENCE ORDER

Following pretrial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court,

It Is Ordered:

I. This is an action for:

Collection of federal internal revenue taxes.

II. Federal jurisdiction is invoked upon the ground:

As provided by Section 7403 of the Internal Revenue Code of 1954.

III. The following facts are admitted and required no proof:

1. For some years prior to March 1, 1948, decedent Murrey London was engaged in business under the fictitious name London Construction Company.

2. Federal Internal Revenue taxes were assessed against Murrey London, d/b/a London Construction Company for the periods and in the amounts shown below: [9]

Type of Tax	Taxable Period	Amount Assessed	Assessment List Received
Withholding	4 Qtr. 1947	\$2,764.93	Feb. 24, 1948
Insurance	4 Qtr. Contributions 1947	338.70	Mar. 1, 1948
Unemployment 1947	187.19	Mar. 1, 1948
Additional			
Unemployment 1947	800.02	July 13, 1948
Insurance 1 Qtr. Contributions 1948	279.29	July 23, 1948
Withholding	1 Qtr. 1948	1,304.69	July 22, 1948

3. On March 1, 1948 the decedent Murrey London filed a petition in bankruptcy No. 45752-WM in the United States District Court for the Southern District of California. The United States filed a claim in the sum of \$5,-

759.04 in said bankruptcy proceeding, representing the amount owing on the aforesaid taxes. The claim filed by the United States was allowed without any contest thereof. There was paid by the trustee in said bankruptcy proceedings, in partial satisfaction of said claim, the sum of \$243.29. No other payment has been received, and there is still unpaid to the United States of America the assessed balance of said taxes plus accrued interest thereon.

4. An order discharging said Murrey London of all debts except certain non-dischargeable debts was duly entered in said bankruptcy No. 45752-WM. [10]

5. Murrey London died on September 13, 1954. The defendant Jack Jay Walley was duly appointed executor of the decedent's estate in connection with which probate proceedings are now pending. A claim for the aforementioned taxes which was filed in said probate estate was disallowed.

IV. The reservations as to the facts cited in paragraph III above are as follows:

None.

V. The following facts, though not admitted, are not to be contested at the trial by evidence to the contrary:

None.

VI. The following issues of fact, and no others, remain to be litigated upon the trial:

None.

VII. The exhibits to be offered at the trial, together with a statement of all admissions by and all issues between the parties with respect thereto, are as follows:

None.

VIII. The following issues of law, and no others, remain to be litigated upon the trial:

1. Whether collection of the subject tax liability is barred by the statute of limitations, or
2. Whether the allowance of a claim for taxes filed in bankruptcy proceedings constitutes a judgment upon which there is no statute of limitations for collection, or
3. Whether the period for collection of the subject taxes was suspended during the pendency of the bankruptcy proceedings.

IX. The foregoing admissions having been made by the parties [11] and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

Dated: July 22, 1957.

/s/ WM. C. MATHES,
United States District Judge.

Approved as to form and content:

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Asst. United States Attorney,
Chief, Tax Division;

REMBERT T. BROWN,
Asst. United States Attorney;

/s/ REMBERT T. BROWN,
Attorneys for Plaintiff.

/s/ MILTON DAVIS,
Attorney for Defendant.

[Endorsed]: Filed July 23, 1957. [12]

[Title of District Court and Cause.]

**SUPPLEMENTAL PRETRIAL
CONFERENCE ORDER**

Following pretrial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this court,

It Is Ordered:

I. The following further facts are admitted and require no proof:

(1) The taxes referred to in paragraph III of the original pretrial conference order are provided for in the following chapters of the Internal Revenue Code of 1939:

Insurance Contributions—Subchapter A, Chapter 9; (Federal Insurance Contributions Act).

Unemployment—Subchapter C, Chapter 9; (Federal Unemployment Tax Act).

Withholding—Subchapter D, Chapter 9; (Current Tax Payment Act).

(2) The decedent, Murrey London, died on September 13, 1954, and a petition for probate of the decedent's will was filed on [13] September 17, 1954. On October 25, 1954, defendant Jack Jay Walley was appointed as executor. The probate proceeding is designated as, In the Matter of the Estate of Murrey London, Deceased, No. 35157, Superior Court of the State of California, in and for the County of Los Angeles. On June 29, 1955, more than six years after the last assessment relative to the subject taxes was made, a claim for said taxes was filed in the probate estate and on July 8, 1955, a formal approval of this claim was filed by the executor. On November 7, 1955, the executor petitioned the Court to vacate this approval, and on November 8, 1955, the Court made an order vacating its previous order allowing the claim. On January 3, 1956, an amended claim was filed in the probate proceeding which provided that it amends and supersedes the prior claim dated June 28, 1955, and set forth the basis of the Government's claim as being the judgment resulting from the allowance of the tax claim in the bankruptcy proceedings referred to in the original pretrial con-

ference order. On January 4, 1956, a formal rejection of this amended claim was filed by the executor.

Dated: December 5th, 1957.

/s/ WM. C. MATHES,
Judge.

Approved as to Form and Content:

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Asst. United States Attorney;

REMBERT T. BROWN,
Asst. United States Attorney;

/s/ REMBERT T. BROWN,
Attorneys for Plaintiff.

/s/ JACK JAY WALLEY,
Defendant in Pro. Per.

[Endorsed]: Filed December 9, 1957. [14]

[Title of District Court and Cause.]

**STIPULATION REGARDING
APPLICABLE LAW**

It Is Hereby Stipulated and Agreed by and between plaintiff and defendant, through their respective counsel undersigned, that the period of limitation upon assessment and collection of the employment taxes imposed by subchapters A, C, and D of

Chapter IX of the Internal Revenue Act of 1939, is contained in Section 3312 of said Act, and that said section, prior to its amendment in 1950, provided as follows:

Section 3312. Period of Limitation Upon Assessment and Collection.

Except in cases of income, estate and gift [15] taxes—

(a) **General Rule.** All Internal Revenue taxes shall (except as provided in subsections (b) (c) and (d) be assessed within four years after such taxes became due and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of five years after such taxes became due.

(b) **False Return or No Return.**

(c) **Wilful Attempt to Evade Tax.**

(d) **Collection After Assessment.** When the assessment of any tax imposed by this title has been made within the statutory period of limitation properly applicable thereto, such tax may be collected by distress or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner or the taxpayer.

It Is Further Stipulated and Agreed that Section 1635 of the Internal Revenue Act of 1939, as

amended, as no application to the taxes involved in the instant case since said section was added to the Act by an amendment on August 28, 1950, and when so added provided as follows:

(g) Effective Date. The provisions of this section shall not apply to any tax imposed with respect to remuneration paid during any calendar year before 1951. [16]

In view of the foregoing, the six-year period of limitation for collection after assessment applies equally to the Federal Unemployment Tax Act, the Federal Insurance Contributions Act; and the Current Tax Payment Act of 1943 (Withholding Tax).

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Asst. United States Attorney,
Chief, Tax Division;

REMBERT T. BROWN,
Asst. United States Attorney;

By /s/ REMBERT T. BROWN,
Attorneys for Plaintiff
United States of America.

/s/ JACK JAY WALLEY,
Defendant in Pro. Per.

[Endorsed]: Filed December 4, 1957. [17]

[Title of District Court and Cause.]

ORDER FOR FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

This cause having been tried and submitted for decision, Findings of Fact, Conclusions of Law, and Judgment as prayed for in the complaint, payable in due course of the administration of the Estate of Murrey London, deceased, are ordered in favor of plaintiff and against defendant; and will be lodged with the Clerk by the attorneys for plaintiff, pursuant to local rule 7, within five days.

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause. December 17, 1957.

/s/ WM. C. MATHES,
United States District Judge.

An opinion will be filed.

[Endorsed]: Filed December 17, 1957. [18]

United States District Court for the Southern
District of California, Central Division
No. 313-57—WM—Civil

UNITED STATES OF AMERICA, Plaintiff,
vs.
JACK JAY WALLEY, Executor of the Estate of
Murrey London, Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT

The above-entitled cause came on for trial on July 22, 1957, and for further trial on December 2, 1957, before the Hon. Wm. C. Mathes, Judge, sitting without a jury; plaintiff, United States of America, appearing through its counsel, Laughlin E. Waters, United States Attorney; Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and Rembert T. Brown, Assistant United States Attorney, by Rembert T. Brown, and defendant, Jack Jay Walley, Executor of the Estate of Murrey London, appearing in propria persona, and the matter having been submitted on stipulations of fact entered into by counsel and the Court having considered the same, makes the following findings of fact and conclusions of law.

Findings of Fact

I.

The plaintiff is, and at all times material hereto was, a corporation sovereign and body politic.

II.

This Court has jurisdiction of the above-entitled cause by virtue of the provisions of § 7401 and § 7403 of the Internal Revenue Code of 1954, and 28 U.S.C. §§ 1340, 1345.

III.

For some years prior to March 1, 1948, decedent Murrey London was engaged in business under the fictitious name of London Construction Company.

IV.

The Commissioner of Internal Revenue assessed against the aforesaid Murrey London, doing business as London Construction Company, federal internal revenue taxes of the type, for the taxable period, and in the amounts set forth below. The Collector of Internal Revenue for the 6th Collection District of California received the respective assessment lists showing the assessments of the aforesaid taxes on the dates shown below, on which dates liens of the United States of America arose against all property and rights to property of the taxpayer, as provided in §§ 3670 and 3671 of the 1939 Internal Revenue Code. Shortly after the receipt by the Collector of each assessment list notice of each tax assessed was given to the taxpayer and demand was made upon him for the payment of each tax so assessed, but only the amount of \$243.29 as set forth in paragraph V hereinbelow has been paid. There remains due, owing and unpaid to the United States of America on each lien the sum shown in the last column, which represents the balance of the

assessed tax plus subsequently accruing penalties and interest computed through March 8, 1957. Further interest accumulates on the total balance of assessed taxes, penalties and interest from said date at the statutory rate of six per centum per annum. In [20] addition, lien filing fees of \$5.00 have been incurred.

Type of Tax	Taxable Period	Amount Assessed	Assessment List Rec'd.	Balance Due
	4 Qtr.			
Withholding	1947	\$2,764.93	Feb. 24, 1948	\$4,264.90
Insurance	4 Qtr.			
Contributions ..	1947	338.70	Mar. 1, 1948	538.15
Unemployment ...	1947	187.19	Mar. 1, 1948	289.43
Additional				
Unemployment	1947	800.02	July 13, 1948	1,207.31
Insurance	1 Qtr.			
Contributions ..	1948	279.29	July 23, 1948	421.93
Withholding	1 Qtr.			
	1948	1,304.69	July 22, 1948	1,967.35

V.

On March 1, 1948, the decedent Murrey London filed a petition in bankruptcy No. 45752-WM in the United States District Court for the Southern District of California. On September 14, 1948, a claim for the aforementioned taxes was filed by the United States in said bankruptcy proceeding. This claim was allowed by the Bankruptcy Court in the amount of \$5,759.04. The allowance of this claim, after time for review or appeal had passed, constituted a final adjudication of the rights of the United States and Murrey London, decedent. There was subsequently received by the United States in partial satisfaction of this allowance the sum of \$243.29,

which amount was applied by the said United States to the satisfaction of the tax liability. Other than this partial payment in the amount indicated, no part of the allowance in bankruptcy has been paid, notwithstanding proper demands therefor. An order discharging said Murrey London of all debts except certain non-dischargeable debts was duly entered in said bankruptcy No. 45752-WM. [21]

VI.

The decedent, Murrey London, died on September 13, 1954, and a petition for probate of the decedent's will was filed on September 17, 1954. On October 25, 1954, defendant Jack Jay Walley was appointed as executor. The probate proceeding is designated as, In the Matter of the Estate of Murrey London, Deceased, No. 35157, Superior Court of the State of California, in and for the County of Los Angeles. On June 29, 1955, more than six years after the last assessment relative to the subject taxes was made, a claim for said taxes was filed in the probate estate and on July 8, 1955, a formal approval of this claim was filed by the executor. On November 7, 1955, the executor petitioned the Court to vacate this approval, and on November 8, 1955, the Court made an order vacating its previous order allowing the claim. On January 3, 1956, an amended claim was filed in the probate proceeding which provided that it amended and superseded the prior claim dated June 28, 1955, and set forth the basis of the Government's claim as being the judgment resulting from the allowance of the tax claim in the

bankruptcy proceedings referred to in paragraph V hereinabove. On January 4, 1956, a formal rejection of this amended claim was filed by the executor.

VII.

All conclusions of law which are or are deemed to be findings of fact are hereby incorporated as findings of fact.

Conclusions of Law

I.

This Court has jurisdiction of this action and the parties hereto.

II.

A proceeding in Court to collect federal internal revenue taxes can be commenced at any time within six years after said taxes have been assessed. [22]

III.

The filing of a claim for federal internal revenue taxes in a bankrupt estate is a proceeding in Court to collect said taxes within the meaning of the Internal Revenue Code.

IV.

The allowance of the claim in bankruptcy at bar constitutes in effect a final judgment in favor of the United States.

V.

There is no statute of limitations on a judgment in favor of the United States if such judgment is the result of a timely proceeding in Court to collect the taxes.

VI.

Since the claim for the subject taxes had in effect been reduced to judgment within the six-year period for the collection of said taxes as provided by statute by virtue of the allowance of the claim for said taxes in the bankrupt estate, the claim for said taxes, which was subsequently filed in the probate estate based on that allowance, was timely. A bankruptcy Court is by law a United States District Court sitting as a court in bankruptcy and as such the doctrine of res judicata applies not only to issues which were in fact litigated during the course of the bankruptcy proceedings, but also to issues which might have been litigated. The fact that no objections were filed to the claim filed by the United States in the bankrupt estate is of no consequence.

Judgment

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ordered, adjudged and decreed:

That the plaintiff, United States of America, have judgment for and shall recover from the defendant, Jack Jay Walley as Executor of the Estate of Murray London, deceased, the sum of \$8,949.85, interest computed through December 27, 1957, and thereafter at the rate of \$.87 per day to the date of judgment, together with its costs herein incurred to be taxed by the Clerk of this [23] Court in the sum of \$22.20; all payable in due course of administration

of the Estate of Murrey London, deceased. [26 U.S.C. § 7402(a).]

December 30, 1957.

/s/ WM. C. MATHES,

United States District Judge.

Lodged December 23, 1957.

[Endorsed]: Filed and entered December 30, 1957. [24]

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

Jack Jay Walley, Executor of the Estate of Murrey London, hereby substitutes Milton Davis as attorney of record for said defendant in said defendant's place and stead.

Dated: February 10, 1958.

/s/ JACK JAY WALLEY.

Milton Davis hereby consents to act as attorney of record for the defendant, Jack Jay Walley, Executor of the Estate of Murrey London, in place and instead of said defendant.

Dated: February 10, 1958.

/s/ MILTON DAVIS.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 11, 1958. [25]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court and to the
United States of America, and to Laughlin E.
Waters, United States Attorney:

You, and Each of You, Will Please Take Notice
that the defendant, Jack J. Walley, Executor of the
Estate of Murrey London, hereby appeals to the
United States Court of Appeals for the Ninth Cir-
cuit from the judgment made and entered on the
30th day of December, 1957, in favor of the plaintiff,
United States of America, and against the de-
fendant, Jack J. Walley, Executor of the Estate
of Murrey London, and from the whole thereof.

Dated: February 10, 1958.

/s/ **MILTON DAVIS,**
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 11, 1958. [27]

[Title of District Court and Cause.]

**NOTICE TO CLERK TO PREPARE
CLERK'S TRANSCRIPT**

To the Clerk of the Above-Entitled Court:

The defendant, Jack J. Walley, Executor of the
Estate of Murrey London, hereby requires that you

cause to be prepared in connection with the appeal now being taken by said defendant from the judgment entered in the above-entitled action, a transcript of the record in this action. You are requested to include in said transcript the following instruments and documents:

Complaint for Collection of Internal Revenue Tax; Answer to Complaint; Pretrial Conference Order; Supplemental Pretrial Conference Order; Stipulation re Applicable Law; Order for Preparation of Findings of Fact, etc.; Findings of Fact, Conclusions of Law, and Judgment; and Notice of Appeal, with the date of filing thereof.

Dated: February 18, 1958.

/s/ MILTON DAVIS,
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 19, 1958. [29]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 30, inclusive, containing the original:

Complaint.

Answer to Complaint.

Pretrial Conference Order.

Supplemental Pretrial Conference Order.

Stipulation regarding Applicable Law.

Order for Findings of Fact, Conclusions of Law and Judgment.

Findings of Fact, Conclusions of Law and Judgment.

Substitution of Attorneys.

Notice of Appeal.

**Notice to Clerk to prepare Clerk's Transcript
of Record on Appeal.**

I further certify that my fee for preparing the foregoing record, amounting to \$1.60 has been paid by appellant.

Dated March 4, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 15924. United States Court of Appeals for the Ninth Circuit. Jack J. Walley, Executor of the Estate of Murrey London, Deceased, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 5, 1958.

Docketed March 11, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Case No. 15924

JACK J. WALLEY, etc.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S STATEMENT OF POINTS

To the Clerk of the Above-Entitled Court:

The points on which appellant intends to rely in this court on this appeal are as follows:

1. That the facts as admitted in the pleadings and as stipulated to in the Pretrial Conference Order, do not support the following Conclusions of Law nor the judgment based thereon and made by the trial court:

IV. The allowance of the claim in bankruptcy at bar constituted in effect a final judgment in favor of the United States of America;

VI. Since the claim for the subject taxes has, in effect, been reduced to judgment within the six-year period for collection of said taxes as provided by Statute, by virtue of the allowance of the claim for said taxes in the bankrupt estate, the claim for said taxes, which was subsequently filed in the probate estate based on the allowance, was timely. A bank-

ruptcy court is by law a United States District Court sitting as a court in bankruptcy and, as such, the doctrine of res judicata applies not only to issues which were in fact adjudicated during the course of the bankruptcy proceedings, but also to issues which might have been litigated. The fact that no objections were filed to the claim filed by the United States in the bankrupt estate is of no consequence.

2. The mere automatic allowance of a claim for taxes filed in the taxpayer's bankruptcy proceedings, does not constitute an adjudication resulting in a personal judgment against a bankrupt taxpayer.

3. The allowance of a claim in a bankruptcy proceeding, without a contest thereon, is at best a judgment in rem adjudicating the rights of the creditor to a share in the fund held by the bankruptcy court.

4. The allowance of a claim for taxes against a bankrupt taxpayer in a bankruptcy proceeding, does not attain the dignity of a judgment in the absence of an Order or Decree of Court made after a hearing on a petition relating to allowance of the claim.

5. Even in those cases where the claim against the bankrupt taxpayer, filed in the bankruptcy proceedings, is allowed after a contest to which the bankrupt is a party, it is res judicata only if the claim is based upon a non-existing obligation as distinguished from a non-provable obligation.

6. Except in the case of income, profits, estate and gift taxes, or except as otherwise provided with respect to employment taxes, all Internal Revenue

taxes where the assessment has been made within the statutory period of limitation properly applied thereto, may be collected by a proceeding in court, but only if begun within six years after the assessment of the tax.

7. The general rule that a judgment is conclusive not only as to the subject matter in controversy, but also as to every other matter that was or might have been litigated, is not always applicable literally, and really means that a judgment is conclusive upon the issues tendered by the complaint.

(a) The filing of the claim being "a proceeding in court for the collection of the tax," tenders an issue which, unless adjudicated, does not fall within the rule of *res judicata*.

Dated: March 7, 1958.

/s/ MILTON DAVIS,
Attorney for Appellant.

[Endorsed]: Filed March 11, 1958.

